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INTELLECTUAL PROPERTY IN THE DIGITAL ERA (450H1S)

2000/01

VOLUME 1: COPYRIGHT

Andrew Christie

Faculty of Law

University of Toronto

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READING GUIDE - VOLUMES 1 AND 2 (COPYRIGHT)

References

* *Aust. Copyright Act* = *Copyright Act* 1968 (Cth)
* *Berne Convention* = Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 (Paris revision of July 24, 1971, amended on September 28, 1979)
* *Copyright Act* = *Copyright Act*, R.S.C. 1985, c. C-42
* *UK Copyright Act* = *Copyright, Designs and Patents Act* 1988 (UK)
* *US Copyright Act* = 17 U.S.C. §101 *et. seq.*
* *EC Computer Programs Directive* = Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC)
* *EC Database Directive* = Directive of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (96/9/EC)
* *EU Proposed Information Society Copyright Directive* = *Proposal for a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society* (Common position adopted by the Council on 14 September 2000)
* *TRIPS Agreement* = Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (Annex 1C to the Agreement Establishing the World Trade Organization 1994)
* *WIPO Copyright Treaty* = World Intellectual Property Organization Copyright Treaty 1996

1. TECHNOLOGY OF THE DIGITAL ERA

1.1 Digital Computation

Required Reading:

- *Digital Computation* (extracted from Appendix A in Christie A., *Integrated Circuits and their Contents: International Protection*, 1995, Sweet & Maxwell, London and The Law Book Company, Sydney)

1.2 Digital Communication

Required Reading:

- *A Primer on Internet Technology*, Clarke R., Dempsey G. and Chuin Nee Ooi and O'Connor R.
- *The Domain Name System* (extracted from Froomkin M., "Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution" 50 *Duke L.J.* 17)

2. COPYRIGHT SUBSISTENCE IN THE DIGITAL ERA

2.1 Computer Programs and Languages

Required Reading:

- *Berne Convention*, art. 2(1)
- *TRIPS Agreement*, art. 10(1)
- *WIPO Copyright Treaty*, arts 2 and 4
- *EC Computer Programs Directive*, recs 7-8 and arts 1-3
- *Copyright Act*, s. 2(1) (definition of "computer program")
- *Delrina Corp. v Triolet Systems, Inc.* (1993), 47 CPR (3d) 1 (Ont. Gen. Div.) [pages 27-46]
- *Aust. Copyright Act*, s. 10(1) (definitions of "literary work", "computer program" and "material form")
- *Data Access Corp. v Powerflex Service Pty Ltd* 45 IPR 353 (High Ct Aust.) [paras 1-76, 98-103, 112-123, 127-130]
- *Coogi Australia Pty Ltd v Hysport International Pty Ltd* (1998) 41 IPR 593 (Fed. Ct Aust.) [all paras up to "Do the Hysport programs infringe Coogi's copyright in the XYZ program?"]

Optional Reading:

Apple Computer, Inc. v Mackintosh Computers Ltd [1990] 2 SCR 209
Apple Computer, Inc. v Computer Edge Pty Ltd (1986) 65 ALR 33 (High Ct Aust.)
Autodesk, Inc. v Dyason [No.1] (1992) 173 CLR 330 (High Ct Aust.)
Autodesk, Inc. v Dyason [No.2] (1993) 176 CLR 300 (High Ct Aust.)

2.2 Computer Databases and Data

Required Reading:

- *Berne Convention*, arts 2(1) and (5)
- *TRIPS Agreement*, art. 10(2)
- *WIPO Copyright Treaty*, art. 5
- *US Copyright Act*, s. 103
- *Copyright Act*, s. 2(1) (definition of "compilation") and s. 2.1
- *Tele-Direct (Publications) Inc. v American Business Information Inc.* (1997), 76 CPR (3d) 296 (Fed. C.A.)
- *EC Database Directive*, recs 13-29 and arts 3, 4, 7(1) and 11

Optional Reading:

Feist Publications, Inc. v Rural Telephone Service Co., Inc., 499 US 340 (1991)

2.3 User Interfaces

Optional Reading:

Apple Computer, Inc. v Microsoft Corp., 35 F.3d 1435 (9th Cir. 1994)
Lotus Development Corp. v Borland International Inc., 49 F.3d 807 (1st Cir. 1995)

2.4 Screen Outputs and Multimedia Works

Required Reading:

- *Berne Convention*, arts 2(1) and 14bis(1)
- *Copyright Act*, s. 2(1) (definitions of "dramatic work" and "cinematographic work")
- *Delrina Corp. v Triolet Systems, Inc.* (1993), 47 CPR (3d) 1 (Ont. Gen. Div.) [page 28]
- *Aust. Copyright Act*, s. 10(1) (definitions of "dramatic work" and "cinematograph film")
- *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1997) 37 IPR 462 (Fed. Ct Aust.)

Optional Reading:

Stern Electronics v Kaufman, 669 F.2d 852 (2d Cir. 1982)
Nintendo Co. Ltd v Golden China TV Game Centre (1993) 28 IPR 313

2.5 Computer-Created Works

Required Reading:

- *Express Newspapers v Liverpool Daily Post* [1985] FSR 306 (UK Ch.D.)
- *UK Copyright Act*, ss 9(3) and 178 (definition of "computer-generated")
- Australian Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 2 - Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (1999) [paras 5.42-5.47]

3. COPYRIGHT INFRINGEMENT IN THE DIGITAL ERA: COPYING RIGHTS

3.1 Infringement of Computer Software

Required Reading:

- *Berne Convention*, art. 9(1)
- *TRIPS Agreement*, art. 9(2)
- *WIPO Copyright Treaty*, art. 1(4), and Agreed Statement on art. 1(4)
- *EC Computer Programs Directive*, recs 10-24 and arts 4-6
- *Copyright Act*, s. 3(1)(a)
- *US Copyright Act*, ss 102(b), 106 and 107
- *Sega Enterprises Ltd v Accolade, Inc.*, 24 USPQ 2d 1561 (9th Cir. 1992)
- *Computer Associates International, Inc. v Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992)
- *Aust. Copyright Act*, s. 10(1) (definition of "adaptation")
- *Data Access Corp. v Powerflex Service Pty Ltd* 45 IPR 353 (High Ct Aust.) [paras 77-97, 104-11, 124-125]
- *Coogi Australia Pty Ltd v Hysport International Pty Ltd* (1998) 41 IPR 593 (Fed. Ct Aust.) [all paras onwards from "Do the Hysport programs infringe Coogi's copyright in the XYZ program?"]

Optional Reading:

Whelan v Jaslow 609 F.Supp. 797 F.2d 1222 (3d Cir. 1986)
Delrina Corp. v Triolet Systems, Inc. (1993), 47 CPR (3d) 1 (Ont. Gen. Div.) [pages 5-19]
Christie and Fong, "Copyright Protection for Non-Code Elements of Software", (1997) 7 *Journal of Law and Information Science* 149-168

3.2 Limitations on Exclusive Rights: Fair Use and Fair Dealing

Required Reading:

- *Berne Convention*, art. 9(2)
- *TRIPS Agreement*, art. 13
- *WIPO Copyright Treaty*, art. 10, and Agreed Statement on art. 10
- *Copyright Act*, ss 29, 29.1, 29.2 and 30.6
- *US Copyright Act*, s. 107
- *Kelly v Arriba Soft Corp.*, 77 F.Supp. 2d 1116 (C.D. Cal. 1999)
- *UMG Recordings, Inc. v MP3.com, Inc.*, 92 F.Supp. 2d 349 (S.D. N.Y. 2000)
- *A&M Records, Inc. v Napster, Inc.*, 114 F.Supp. 2d 896 (N.D. Cal. August 10, 2000) [sections I and II.A-C]

Optional Reading:

Sony Corp. of America v Universal City Studios, Inc., 464 US 417 (1984)

3.3 Exceptions to Infringement: Statutory Licences

Required Reading:

- *Copyright Act*, ss 79-82
- *Private Copying 1999-2000, Tariff of Levies to be CPCC, Re* (1999) 4 CPR (4th) 15 [sections I.A, III and IV]
- *AVS Technologies Inc. v Canadian Mechanical Reproduction Rights Agency* Docket A-19-00 (Fed. Ct App.), June 14, 2000

Optional Reading:

Audio Home Recording Act 1992 (US), 17 U.S.C. § 1001 *et. seq.*
RIAA v Diamond Multimedia Systems, Inc., 180 F. 3d 1072 (9th Cir. 1999)

3.4 Indirect and Contributory Infringement

Required Reading:

- *Copyright Act*, s. 3(1)
- *US Copyright Act*, ss 106, and 512(b)
- *A&M Records, Inc. v Napster, Inc.*, 54 USPQ 2d 1746 (N.D. Cal. May 5, 2000)
- *A&M Records, Inc. v Napster, Inc.*, 114 F.Supp. 2d 896 (N.D. Cal. August 10, 2000) [sections II.D and E]

Optional Reading:

Religious Technology Center v Netcom On-Line Communication Services, Inc., 907 F.Supp. 1361 (N.D. Cal. 1995)

3.5 Circumvention of Technological Protection Measures

Required Reading:

- *WIPO Copyright Treaty*, arts 11 and 12
- *EU Proposed Information Society Copyright Directive*, recs 47-56 and arts 6-7
- *US Copyright Act*, ss 1201-1204
- *Universal City Studios Inc., v Reimerdes*, 111 F.Supp. 2d 294 (S.D.N.Y. 2000)

Optional Reading:

Digital Millennium Copyright Act 1998 (US), s104
US Copyright Office, *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Final Rule* 37 CFR Part 201 [Docket No. RM 99-7D] 65 FR 64556 (October 27, 2000)

4. COPYRIGHT INFRINGEMENT IN THE DIGITAL ERA: COMMUNICATION RIGHTS

4.1 Linking to and Framing Websites

Required Reading:

- *Shetland Times Limited v Dr Jonathan Wills* [1997] FSR 604 (Scot. Ct. Sess)
- *Intellectual Reserve, Inc. v Utah Lighthouse Ministry, Inc.*, 75 F.Supp. 2d 1290 (C.D. Utah 1999)
- *Futuredontics, Inc. v Applied Anagramics, Inc.*, 45 USPQ 2d 2005 (C.D. Cal. 1998)
- *Ticketmaster Corp. v Tickets.com, Inc.*, 54 USPQ 2d 1344 (C.D. Cal. 2000)

4.2 Making Available over the Internet

Required Reading:

- *Berne Convention*, arts 11bis and 11ter
- *WIPO Copyright Treaty*, art. 8
- *Copyright Act*, ss 2 (definition of "telecommunication"), 2.4(1) and 3(1)(f)
- *Tariff 22, Internet, Re* (1999) 1 CPR (4th) 417 [section III]
- *Twentieth Century Fox Film Corporation v iCraveTV* (note)

Optional Reading:

US Copyright Act, ss 106(4), 114
US Copyright Office, *Public Performance of Sound Recordings: Definition of Service* 37 CFR Part 201 [Docket Nos RM 2000-3B and RM 2000-4B] 65 FR 77292 and 65 FR 77330 (December 11, 2000)

4.3 Exceptions to Exclusive Rights

Required Reading:

- *WIPO Copyright Treaty*, Agreed Statement on art. 8
- *Copyright Act*, s. 2.4(1)(b)
- *US Copyright Act*, ss 512(a) and (k)
- EU Proposed Information Society Copyright Directive, recs 27 and 31-45, and arts 5(1), (3) and (5)

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139 *Computer Associates International, Inc. v Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992)
160 *Coogi Australia Pty Ltd v Hysport International Pty Ltd* (1998) 41 IPR 593 (Fed. Ct Aust.)
183 *Data Access Corp. v Powerflex Service Pty Ltd* 45 IPR 353 (High Ct Aust.)
219 *Delrina Corp. v Triolet Systems, Inc.* (1993), 47 CPR (3d) 1 (Ont. Gen. Div.)
247 *Express Newspapers v Liverpool Daily Post* [1985] FSR 306 (UK Ch.D.)

Volume 2

251 *Futuredontics, Inc. v Applied Anagramics, Inc.*, 45 USPQ 2d 2005 (C.D. Cal. 1998)
255 *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1997) 37 IPR 462 (Fed. Ct Aust.)

270 *Intellectual Reserve, Inc. v Utah Lighthouse Ministry, Inc.*, 75 F.Supp. 2d 1290 (C.D. Utah 1999)
274 *Kelly v Arriba Soft Corp.*, 77 F.Supp. 2d 1116 (C.D. Cal. 1999)
280 *Private Copying 1999-2000, Tariff of Levies to be CPCC, Re* (1999) 4 CPR (4th) 15
309 *Sega Enterprises Ltd v Accolade, Inc.*, 24 USPQ 2d 1561 (9th Cir. 1992)
326 *Shetland Times Limited v Dr Jonathan Wills* [1997] FSR 604 (Scot. Ct. Sess)
329 *Tariff 22, Internet, Re* (1999) 1 CPR (4th) 417
346 *Tele-Direct (Publications) Inc. v American Business Information Inc.* (1997), 76 CPR (3d) 296 (Fed. C.A.)
354 *Ticketmaster Corp. v Tickets.com, Inc.*, 54 USPQ 2d 1344 (C.D. Cal. 2000)
357 *UMG Recordings, Inc. v MP3.com, Inc.*, 92 F.Supp. 2d 349 (S.D. N.Y. 2000)
361 *Universal City Studios Inc., v Reimerdes*, 111 F.Supp. 2d 294 (S.D.N.Y. 2000)

Articles, Books, Chapters, Notes, Papers and Reports

400 *A Primer on Internet Technology*, Clarke R., Dempsey G. and Chuin Nee Ooi and O'Connor R.
415 Australian Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 2 - Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (1999)
420 *Digital Computation* (extracted from Appendix A in Christie A., *Integrated Circuits and their Contents: International Protection*, 1995, Sweet & Maxwell, London and The Law Book Company, Sydney)
443 *The Domain Name System* (extracted from Froomkin M., "Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution" 50 *Duke L.J.* 17)
457 *Twentieth Century Fox Film Corporation v iCraveTV* (note)